Filed 7/21/20 Berdeski v. Kanakaris CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PHILLIP R. BERDESKI, etc., Plaintiff and Appellant, v. DENNY KANAKARIS, etc., et al., Defendants and Respondents.	D075657 (Super. Ct. No. 37-2018-00007237-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

Law Office of William E. O'Nell and William E. O'Nell for Plaintiff and Appellant.

County Law Center and Marc A. Duxbury for Defendant and Respondent.

This is an appeal from a judgment following a nonjury trial. At trial, plaintiff Phillip R. Berdeski, Trustee of the Berdeski Family Trust UDT 5-1-2006 (Berdeski) sought to collect on a promissory note from defendant Denny Kanakaris aka

Demonsthenis Kanakaris (Kanakaris) and his wholly owned company, defendant Xplorador, Inc. (Xplorador). The court ruled in favor of Kanakaris and Xplorador (together Defendants), concluding that they proved their affirmative defense of mutual mistake.

Berdeski seeks a reversal on the basis that, in its statement of decision, the court did not address either whether the mutual mistake was "material", or if the mistake was material, "how to rescind the deal." As we will explain, because Berdeski did not properly request a statement of decision, in this appeal the sufficiency of the statement is not at issue, and the limitations that attach to appellate review of a statement of decision do not apply. Instead, we will review the merits of these issues under traditional rules of appellate review, pursuant to which Berdeski did not meet his burden of establishing reversible error. As we will further explain, Berdeski also failed to establish that the court erred in interpreting or applying Business and Professions Code section 24076 (section 24076), which prohibits the pledge of a transfer of a liquor license as security for a loan or other agreement.

Accordingly, we will affirm the judgment.

I. STATEMENT OF THE CASE[1]

In the May 3, 2017 promissory note at issue, Defendants jointly and severally promised to pay Berdeski the principal sum of $42,500 in 72 equal monthly installments

---

1 In this part of the opinion, we will describe generally the parties' positions during trial after setting forth some of the evidence presented, consistent with the applicable appellate standard that requires us to " 'consider the evidence in the light most favorable

of $588, beginning June 1, 2017, and one final installment of $164 (Note).[2] Defendants made five $588 payments during the June - October 2017 time period.

In January 2018 Berdeski gave notice to Kanakaris that he was in default, and in February 2018, Berdeski filed the underlying action against Kanakaris, attaching a copy of the Note. In one cause of action, Berdeski alleged breach of contract; in a second cause of action Berdeski alleged a common count; and in both causes of action, Berdeski sought $42,500 in damages.

A. *People and Entities*

Berdeski owned the Bonita Village Shopping Center. At issue in this appeal are suite numbers 4108, 4110, and 4112 at the shopping center (the Premises).

In October 2014 Berdeski leased the Premises to Esteban G. Ochoa and Gerardo Ochoa (the Ochoas), who ran their business at the Premises through their company, 8 A's Inc. As part of this business, 8A's owned a California Type 47 liquor license (the Liquor License).[3]

---

to the prevailing party, giving such party the benefit of every reasonable inference, and resolving all conflicts in support of the judgment.' " (*Gooch v. Hendrix* (1993) 5 Cal.4th 266, 279.) We will include additional evidence in the discussion of the issues at part II., *post*, as necessary.

2 The Note contains the name of a third obligor, but the trial exhibit of the Note does not contain his signature. The parties do not mention him in their appellate briefing, and we shall not mention him further.

3 According to the California Department of Alcoholic Beverage Control (ABC), a Type 47 license is entitled, "On Sale General – Eating Place" and is described as follows: "Authorizes the sale of beer, wine and distilled spirits for consumption on the licenses premises. Authorizes the sale of beer and wine for consumption off the licenses

The Ochoas' business did not do well, and by Lease Transfer & Modification Agreement dated April 12, 2016 (April 2016 Agreement), the Ochoas' lease and the Liquor License were transferred to a new tenant, Xplorador, "via Berdeski." At the time, the two principals of Xplorador were Arturo Maldonado and Mauro Ledezma.

The April 2016 Agreement was between Berdeski and Xplorador and describes the following two steps to the transaction: "(i) Step-One from Tenant (Ochoa) to Landlord (Berdeski); (ii) Step-Two from Landlord (Berdeski) to Tenant (Xplorador), as more fully described as follows: . . . ." Step One was completed a few days before Berdeski and Xplorador executed the April 2016 Agreement. Berdeski believed that, pursuant to the documentation associated with "Step-One," he obtained an interest in the Liquor License.

The April 2016 Agreement described the new business to be conducted on the Premises as an " 'Off Track Betting (OTB)' restaurant." (Bolding and underscoring omitted.) The April 2016 Agreement expressly considered and authorized further agreements by which Kanakaris, through an entity known as "58 Flat," would conduct off track betting on the Premises for a 20-year term. The various agreements were to be between and among: (1) Berdeski, (2) Xplorador (Maldonado & Ledezma), and (3) Race

---

premises. Must operate and maintain the licensed premises as a bona fide eating place. Must maintain suitable kitchen facilities, and must make actual and substantial sales of meals for consumption on the premises. Minors are allowed on the premises." (<https://www.abc.ca.gov/licensing/license-types/> [as of July 21, 2020], archived at <https://perma.cc/5AAC-DS8K>.)

& Sports Authority, LLC, dba 58 Flat, an entity owned by Kanakaris and another individual.

As of early July 2016, Xplorador applied to the ABC for a transfer of the Liquor License from 8 A's (the Ochoas). Through early April 2017, Xplorador received temporary permits, which the ABC issued and reissued twice.

In mid-March 2017, Xplorador terminated its lease with Berdeski. In its written notice of termination, Xplorador referred to its unsuccessful "repeated attempts" to reach an agreement with Berdeski and 58 Flat.

Over the following six weeks, the parties and others were involved in discussions and negotiations regarding the Premises, a tenant for the Premises, a lease for the Premises, and the Liquor License. Throughout this time, Kanakaris's principal concern was that he "needed to secure" the Liquor License, "because of the nature of [his off track betting] business"; and due to this concern, Kanakaris did not want to take any chance that he would not promptly obtain the Liquor License. Kanakaris described the days leading up to a May 3, 2017 closing as "a very hectic time," during which he was unsure who owned the Liquor License. Accordingly, as part of the closing Kanakaris both: (1) became the owner of Xplorador by purchasing the stock and assets of the company from Maldonado and Ledezma in exchange for approximately $30,000; and (2) agreed, on behalf of himself and Xplorador (as its President), to pay Berdeski $42,500, as evidenced by the Note, in exchange for Berdeski transferring the Liquor License to him. After the May 3 closing, Kanakaris, through 58 Flat, operated the off track betting on the

Premises; Kanakaris purchased Xplorador; Xplorador operated the alcohol sales on the Premises; and Berdeski remained the landlord of the Premises.

On May 8, 2017, Berdeski and Kanakaris went to the ABC's offices to effect a transfer of the Liquor License to Kanakaris. There they both learned for the first time that Berdeski did not own the Liquor License. Not only was Berdeski unable to effect or assist in the transfer of the Liquor License, the ABC required that he wait outside as Kanakaris completed his business. Based on Xplorador's original application in July 2016 (when its shareholders were Maldonado and Ledezma), on May 17, 2017, the ABC issued the Liquor License to Xplorador (when its sole shareholder was Kanakaris).[4]

Within days, Kanakaris and Berdeski had a loud verbal disagreement, in which Kanakaris told Berdeski that he (Kanakaris) would not pay him (Berdeski) for the Liquor License because of "troubles" or "issues" with the ABC. Meanwhile, during the June through October 2017 time period, Kanakaris made five $588 payments under the Note before discontinuing all further payments.

B. *The Lawsuit*

In February 2018, Berdeski sued Kanakaris on the Note, accelerating all payments and alleging $42,500 in damages. In July 2018, the parties stipulated, and the court ordered, that Xplorador be added as a defendant to Berdeski's complaint and as a cross-

---

4 The ABC issued the Ochoas license No. 563404, which they surrendered in July 2017, and the ABC issued Xplorador a new license No. 571092 in May 2017. We shall continue to refer to it as "the Liquor License," since both licenses were for the same service (Type 47, On-Sale General Eating Place) and same location (the Premises).

complainant to Kanakaris's cross-complaint. The parties presented their claims and defenses during a two-day court trial in December 2018.[5] Prior to the start of the trial, Berdeski filed a request for a statement of decision under Code of Civil Procedure section 632.

Defendants' principal defense was mutual mistake: Berdeski agreed to sell and Defendants agreed to buy Liquor License in exchange for the $42,500 obligation evidenced in the Note; as of the May 3, 2017 closing, Berdeski and Kanakaris both believed that Berdeski had an interest in, by which he could effect a transfer of, the Liquor License; but on May 8, 2017, they both learned for the first time that the ABC did not consider Berdeski to have an ownership interest in the Liquor License.

Anticipating this defense, Berdeski presented evidence of a difficult, complex, and time-sensitive May 3, 2017 closing that involved various transactions and numerous documents between, among, and related to Berdeski, the Ochoas, Maldonado and Ledezma (and Xplorador during their ownership), and Kanakaris (and Xplorador during his ownership).[6] According to Berdeski, the Note was not given in exchange for the

---

[5] Defendants dismissed their cross-complaint on the first day of trial, and there is no issue on appeal as to the cross-complaint. The record on appeal does not contain a copy of the cross-complaint.

[6] These documents included, but were not limited to, a purchase agreement for the stock of Xplorador, a lease for the Premises, a personal guarantee for the lease, numerous releases, and of course the Note. In addition, these documents attempted to comply with corporate formalities and to effect leases concessions for Xplorador's benefit both before and after the sale of its stock from Maldonado and Ledezma to Kanakaris.

Liquor License; instead, it and its $42,500 obligation were one small part of a much larger deal. Berdeski contended that he "agreed to facilitate the sale of Xplorador to [Kanakaris] so that Xplorador can comply with the ABC requirements and retain the [L]iquor [L]icense" in exchange for obtaining releases from Maldonado and Ledezma, for modifying the lease to the benefit of Kanakaris, and for applying credits for Kanakaris's financial obligations.

At the conclusion of the trial, the court took the matter under submission. A week later, in mid-December 2018, the court issued a tentative decision, in which it discussed the evidence presented, made findings of fact, and concluded that Defendants met their burden of establishing the affirmative defenses of mutual mistake.

In response, Defendants submitted a proposed statement of decision and a proposed judgment. For the most part, the proposed statement of decision parroted the court's tentative decision; consistent with the tentative decision, the proposed statement of decision provided, "While the purchase of the [L]iquor [L]icense by Mr. Kanakaris from Mr. Berdeski was part of the transaction, *the* [*N*]*ote was solely for the purchase of the* [*L*]*iquor* [*L*]*icense*. *This was due to the mutual mistake over who owned the* [*Liquor L*]*icense*." (Italics added.)

Berdeski filed objections to Defendants' proposed statement of decision.

After considering Defendants' proposed statement of decision and Berdeski's objections, the court filed as its statement of decision and judgment the proposals

submitted by Defendants. A judgment, which provides that Berdeski "recovers nothing" from Defendants, was entered in favor of Defendants.[7]

Berdeski timely appealed from the judgment.

II. DISCUSSION

Berdeski raises three issues on appeal.[8] Relying on his request for a statement of decision, his objections to Defendants' proposed statement of decision, and the court's statement of decision, Berdeski seeks a reversal on the basis that the court did not address either (1) whether the mistake as to the ownership of the Liquor License was "material",[9]

---

7 Neither the court's tentative decision, Defendants' proposed statement of decision, Berdeski's objections to the proposed statement of decision, the judgment, nor the briefing on appeal mentions Berdeski's second cause of action based on a common count for money paid, laid out, and expended for Defendants' benefit.

The judgment was later amended to provide that Kanakaris was entitled to recover from Berdeski $29,670 in attorney fees and $835 in costs. There are no issues in this appeal related to the award of attorney fees or costs.

8 Defendants do not respond to the second two issues. Even where a respondent does not file a brief, we do not consider this failure an admission of error. (*County of San Diego Dept. of Child Support Services v. C.P.* (2019) 34 Cal.App.5th 1, 7, fn. 7; Cal. Rules of Court, rule 8.220(a)(2).) Berdeski (as appellant) has the burden of establishing reversible error, and we review his presentation—here, an opening brief, a clerk's transcript, and a reporter's transcript—and determine whether he met his burden. (*C.P.*, at p. 7, fn. 7.)

9 In introducing this argument, Berdeski states without a record reference that "the Court found that the parties were mistaken as to how the [ABC] would treat certain rights and duties arising out of a series of transactions concerning (among other things) a liquor license." This misstates the record. The court expressly found that "the mutual mistake [was] over *who owned the* [*Liquor L*]*icense*"; the court made no findings as to how the ABC might treat any rights or duties arising from "a series of transactions." (Italics added.)

or (2) if the mistake was material, "how to rescind the deal." Berdeski further contends that the court erred in interpreting and applying section 24076, which prohibits the pledge of a transfer of a liquor license as security for a loan or other agreement.

As in all appeals, before reaching the merits, "the threshold issue" for determination is the proper standard of review to be applied. (*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611.) This standard will establish " 'the degree of deference given by the reviewing court to the actions or decisions under review.' " (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667.) As we explain, here, because Berdeski did not properly request a statement of decision, the sufficiency of the statement is not at issue, and the limitations that accompany appellate review of a statement of decision do not apply. Instead, we will apply traditional rules of appellate review, where "a judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (*Arceneaux*); accord, *Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609 (*Jameson*); *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) Addressing the merits of Berdeski's arguments under these presumptions, we will conclude that the mutual mistake was material, that rescission was never at issue in this case, and that the trial court did not err in interpreting or applying section 24076.

A. *Berdeski's Request for a Statement of Decision Was Legally Insufficient to Overcome the Presumption That the Trial Court Made All Necessary Findings to Support the Judgment for Which Substantial Evidence Exists in the Record*

A properly issued statement of decision should explain the legal and factual basis "as to each of the principal controverted issues" at trial. (Code Civ. Proc., § 632.) While our research has not disclosed a definition of the phrase "principal controverted issue," we know that "the trial court need not, in a statement to decision, 'address all the legal and factual issues raised by the parties,' " but only " 'set out ultimate findings.' " (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 559, quoting *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.) An "ultimate finding" decides "a core fact, such as an element of a claim or defense, without which the claim or defense must fail" and "is distinguished conceptually from 'evidentiary facts' and 'conclusions of law.' " (*Yield Dynamics*, at p. 559.)

Prior to trial, Berdeski requested a statement of decision; upon receipt of Defendants' proposed statement of decision, Berdeski filed objections; and on appeal, Berdeski seeks a reversal, in part based on what he contends is an inadequate statement of decision. As we explain, because Berdeski's request for a statement of decision was legally insufficient, Berdeski has waived his objections to the adequacy of the statement of decision. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 983 (*Thompson*).)

1. *Law*

An appealed judgment is "presumed to be correct," and the burden is on the appellant to establish reversible error. (*Jameson*, *supra*, 5 Cal.5th at pp. 608-609; accord, *Arceneaux, supra*, 51 Cal.3d at p. 1133.) "All intendments and presumptions are

indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.". (*Denham, supra,* 2 Cal.3d at p. 564; accord, *Arceneaux*, at p. 1133.) " 'This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Jameson*, at p. 609; see Cal. Const., art. VI, § 13.)

In a court trial, application of this fundamental principle triggers the doctrine of implied findings: If the parties waived a statement of decision, the appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record; i.e., the necessary findings of "ultimate facts" will be implied and the only issue on appeal is whether the "implied" findings are supported by "substantial evidence. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793, superseded by statute on other grounds as stated in *In re Zacharia D.* (1993) 6 Cal.4th 435, 448.) Without a proper statement of decision, therefore, an appellant waives on appeal any objections based on the trial court's failure to make all factual findings necessary to support its ruling, and the only fact-based question for the appellate court is whether the findings, express or implied, are supported by substantial evidence. (See *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970-971 (*Acquire II*).)

The issuance of a properly requested statement of decision will avoid an application of the doctrine of implied findings in a nonjury trial *only if* "both steps of the two-step procedure under [Code of Civil Procedure] section[s] 632 and 634" are followed. (*Thompson, supra,* 6 Cal.App.5th at p. 983.) Initially, any party may request

that the trial court "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues[.]" (Code Civ. Proc., § 632; accord, Cal. Rules of Court, rule 3.1590(d) ["The principal controverted issues must be specified in the request [for a statement of decision]."].) In addition, if the statement of decision does not resolve a controverted issue or is ambiguous, the omission or ambiguity must properly be brought to the attention of the trial court; otherwise, "it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Code Civ. Proc., § 634; see Cal. Rules of Court, rule 3.1590(g).)

2. *Analysis*

Berdeski's request for a statement of decision was legally inadequate. In its entirety, the request provides: "Pursuant to Code of Civil Procedure Section 632[, Berdeski] hereby requests that the Court issue a statement of decision." However, Code of Civil Procedure section 632 requires that a "request for a statement of decision *shall specify those controverted issues* as to which the party is requesting a statement of decision." (Italics added; see also Cal. Rules of Court, rule 3.1590(d).) As the *Thompson* court explained: "Where a party fails to 'specify . . . controverted issues' or otherwise 'make proposals as to the content' of a statement of decision under section 632 (forcing the trial court to guess at what issues remain live during preparation of the statement of decision), . . . objections to the adequacy of a statement of decision may be deemed waived on appeal." (*Thompson, supra,* 6 Cal.App.5th at p. 983; accord, *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59 (*Fladeboe*).)

Appellate courts often must determine whether an appellant's request for a statement of decision sufficiently described the controverted issues raised on appeal; however, that is not a concern in this appeal, since here *Berdeski did not specify any controverted issue in his request*.

We acknowledge both that Berdeski timely objected to the proposed statement of decision as required by Code of Civil Procedure section 634 and that his objections set forth the issues and arguments which he presents on appeal. However, "[t]he second step is not a substitute for the first. Objections [under section 634] are germane only as to issues framed as materially controverted under section 632." (*Thompson*, *supra*, 6 Cal.App.5th at p. 982.) "[S]trict adherence to both steps of the process is necessary before we will reverse the presumption of correctness generally accorded trial court judgments on appeal." (*Id.* at p. 983.)

Accordingly, by his failure to have specified any controverted issue in his request for a statement of decision, we deem Berdeski to have waived any objection to the adequacy of the statement of decision. We will, therefore, apply the presumption of correctness generally accorded trial court judgments on appeal. Under this presumption, the doctrine of implied findings requires that we infer the trial court made factual findings favorable to Defendants on all issues necessary to support the judgment and that we review those findings under the substantial evidence standard.[10] (*Thompson*, *supra*, 6

---

10 This ruling does not affect our responsibility to review de novo any issues of law. (*Thompson*, *supra*, 6 Cal.App.5th at p. 981.)

Cal.App.5th at pp. 984-985; *Fladeboe*, *supra*, 150 Cal.App.4th at pp. 59-60; *Acquire II*, *supra*, 213 Cal.App.4th at p. 970.)

B. *The Trial Court's Failure to Address the Materiality of the Mutual Mistake is Not Error*

We next consider whether, as Berdeski contends, the trial court erred by failing to address the materiality of the parties' mutual mistake in the statement of decision. We disagree; the court was not required to address materiality for a number of reasons.

Initially, as we explained at part II.A., *ante*, because Berdeski was not entitled to a statement of decision, the trial court's failure to address materiality cannot be error. In addition, since the materiality of a mistaken fact on which the parties relied in entering into a contract is an issue of law (*Merced County Mutual Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772; CACI No. 331, Directions for Use (2020)), there was never a requirement that it be included in a statement of decision. " 'It is axiomatic that a statement of decision is required only as to issues of fact decided by the trial court ([Code Civ. Proc.,] § 632: "upon the trial of a question of fact by the court"), not as to issues of law.' " (*Young v. California Fish and Game Commission* (2018) 24 Cal.App.5th 1178, 1192.)

Nonetheless, because materiality is a question of law, we are able to review it without an explanation of the trial court's reasoning. According to Berdeski, the "uncontroverted evidence establishes that the mutual mistake the court found was not

material as a matter of law."[11] Again, we disagree; the evidence in fact was disputed, and under the applicable standard of review, the mutual mistake was material.

We begin by focusing on what the trial court deemed to be the mutual mistake—namely, "who owned the [Liquor L]icense."[12] We continue our analysis by noting that Berdeski does not challenge the evidentiary support for this ruling. He argues *only* that the court failed to address whether this mutual mistake was sufficiently *material* to support an application of the affirmative defense.

We review de novo the trial court's determination of legal issues. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Thompson*, *supra*, 6 Cal.App.5th at p. 981.) Whether "the application of the rule to the facts and the consequent determination whether the rule is satisfied," however, presents mixed questions of law and fact. (*Crocker Nat'l Bank v. City & County of San Francisco* (1989) 49 Cal.3d 881, 888.) In such circumstances, we review questions of fact (e.g., "the historical basis of the transaction[]—in common parlance, what happened") for substantial evidence and

---

11 For purposes of applying uncontroverted facts to the law, facts are " 'undisputed' " if they are " 'settled' or 'not open to dispute or question.' " (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.)

12 In their affirmative defense entitled "Mutual Mistake," Defendants alleged in full: "[Berdeski] did not have the capacity to transfer *ownership* of the liquor license in question and [Kanakaris] did not know this when he signed the Promissory Note." (Bolding omitted, italics added.) At times, Berdeski does not distinguish between an ownership interest in the Liquor License and what he describes a " 'beneficial interest' " in the Liquor License. We are aware of the distinction; we have no reason to believe the trial court was not aware of the distinction; and, we proceed with the understanding that the court found the mutual mistake to be over the *ownership* of the Liquor License.

questions of law de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800, 801 (*Ghirardo*).) After applying the proper standard for this determination,[13] if " ' " 'the nature of the inquiry' " ' " is essentially factual, we defer to the trial court and review the record for substantial evidence to support the ruling; or if " ' " 'the nature of the inquiry' " ' " is essentially legal, we exercise independent judgment. (*Id.* at pp. 800-801.)

The mistake of a defendant, a plaintiff, or even a third party may form "a direct defense to an action on a contract, and a basis for avoidance through rescission, reformation, or similar remedy." (2 Schwing, Cal. Affirmative Def. (2d ed. 2019) § 40.1.) A mistake sufficient to form an affirmative civil defense may be either of fact or of law (Civ. Code, § 1576; *Hannah v. Steinman* (1911) 159 Cal. 142, 146 (*Hannah*)) or of both (*Brown v. Volz* (1949) 90 Cal.App.2d 793, 800). Generally speaking, " ' "[a] 'mistake of fact' is where a person understands the facts to be other than they are; whereas a 'mistake of law' is where a person knows the facts as they really are, but has a mistaken

---

13 We must look to " ' " 'the nature of the inquiry that is required to decide "whether the rule of law as applied to the established facts is or is not violated." [Citation.] If application of the rule of law to the facts requires an inquiry that is "essentially factual," [citation]—one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," [citation]—the concerns of judicial administration will favor the [trial] court, and the [trial] court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.' " ' " (*Ghirardo, supra*, 8 Cal.4th at pp. 801-802.)

belief as to the legal consequences of those facts.' " (*People v. Lamarr* (1942) 20 Cal.2d 705, 710; see Civ. Code, §§ 1577 [mistake of fact], 1578 [mistake of law].)

Even if a mistake would properly form the basis for a defense, the mistake must have been *material* to the contract or it will be legally insufficient as a defense. (*Hannah*, *supra*, 159 Cal. at pp. 146-147 [the mutual mistake was material, because it "went to the essence of the contract"]; *Bellwood Discount Corp. v. Empire Steel Bldg. Co.* (1959) 175 Cal.App.2d 432, 435; see Civ. Code, §§ 1568, 1577, 1578.) Stated differently, purely incidental or collateral mistakes are insufficient to form the basis for a defense against an action on a contract. (*Bellwood*, at p. 435.) In ruling that "the mistake . . . must be one material to the contract," *Reid v. Landon* (1958) 166 Cal.App.2d 476 (*Reid*) explained: "The mistake must be such that it animated and controlled the conduct of the party; go to the essence of the object in view and not be merely incidental. The court must be satisfied that *but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved*." (*Id*. at p. 483, italics added.) To be material, the mistake "must affect the execution and the essential elements of the contact . . . , which elements are stated to be the parties, the subject-matter, the consideration and the offer and acceptance." (*Hannah*, at p. 147.)

Based on the foregoing " ' " 'nature of the inquiry' " ' " and the applicable legal standard (*Ghirardo*, *supra*, 8 Cal.4th at pp. 801-802), the determination of whether the ownership of the Liquor License was material to the execution of the Note is a predominantly legal inquiry. Thus, we will review the factual findings for substantial evidence and will review de novo the law and the application of the facts to the law.

(*Ghirardo*, at pp. 801-802.) As we explain, based on these standards of review, we will conclude that "the mutual mistake over who owned the [Liquor L]icense" was material to the execution of the Note in this case.

"The definition of substantial evidence review in the appellate courts is very well settled . . . : 'In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in to uphold the [finding] if possible. It is an elementary, but often overlooked principle of law, that when a [finding] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' " (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571, quoting *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429.)

" '[T]he test is *not* the presence or absence of a substantial conflict in the evidence. Rather, it is simply whether there is substantial evidence in favor of the respondent.' " (*Dane-Elec Corp., USA v. Bodokh* (2019) 35 Cal.App.5th 761, 770.) The fact that the record may contain substantial evidence in support of an appellant's claims is irrelevant to our role, which is limited to a determination of the sufficiency of the evidence *in support of the judgment actually made*. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "[T]he evidence most favorable to [the respondent] must be accepted as true and conflicting evidence must be disregarded." (*Campbell v. General Motors Corp.* (1982)

32 Cal.3d 112, 118; accord, *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1203, fn. 1 ["we must accept all evidence which supports the [respondent, and] disregard the conflicting evidence"]; *Howard*, at p. 631 ["we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing"].) The testimony of a single witness, including that of a party, may be sufficient (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Thompson*, *supra*, 6 Cal.App.5th at p. 981; Evid. Code, § 411); whereas even uncontradicted evidence in favor of an appellant does not necessarily establish the fact for which the evidence was submitted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

Under this standard, substantial evidence supports the trial court's finding that, even though Kanakaris's purchase of the Liquor License "was part of the [overall May 3, 2017] transaction, *the* [*N*]*ote was solely for the purchase of the* [*L*]*iquor* [*L*]*icense*." (Italics added.) In particular, Kanakaris testified:

> "Q: Does [Exhibit 27] refresh your recollection that the . . . [N]ote was part of a deal between all the parties to put things to rest.
>
> "A: Absolutely not.
>
> "Q: Okay. So it's your position the . . . [N]ote was not part of a bigger deal?
>
> "A: *The . . . [N]ote was strictly for the purchase of a liquor license that Mr. Berdeski represented that he had the legal rights to, period. Nothing else*. . . . Mr. Berdeski represented the [$]42,500 was for the purchase of an ABC 47 liquor license from the Ochoas[—i.e., the Liquor License]." (Italics added.)[14]

---

14 This is not a situation in which the contracting parties entered into a deal for a liquor license worth $72,500 ($42,500 to Kanakaris and $30,000 to Maldonado and

Consistently, additional testimony and trial exhibit No. 25 (text messages) established that the *first time* Kanakaris or Berdeski learned that Berdeski did not own the Liquor License was on May 8, 2017, when the ABC would not allow Berdeski to assist in the transfer of the Liquor License to Kanakaris. This happened five days after Kanakaris executed the May 3, 2017 Note.

Disregarding all conflicting evidence as we must, we are left with substantial evidence of a straightforward one-page promissory note that Kanakaris gave to Berdeski in exchange for a specific liquor license from Berdeski.[15] The parties, subject matter,

---

Ledezma for the assets of Xplorador), with Kanakaris assuming the risk that either Berdeski or Xplorador did not own it. (See, e.g., *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 885 (*Guthrie*) ["the kind of mistake which renders a contract voidable does not include 'mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk' "], discussed in the text, *post*.) Kanakaris testified that he essentially paid twice for the same license, acquiring the assets of Xplorador in the event Berdeski did not own it. Because Kanakaris "needed to secure" the Liquor License immediately, Kanakaris expected to avoid his obligation either to Berdeski or to Maldonado and Ledezma after Kanakaris obtained the Liquor License.

[15] While we may not have made the same finding *in the first instance*, that is not the normal role of an appellate court; we consider only whether the record contains substantial evidence in support of *the ruling already made* by the trial court. Even if we assume the record contains substantial evidence to support Berdeski's counsel's closing argument that "the actual deal that took place . . . had lots of consideration going back and forth," we must disregard such evidence in our substantial evidence analysis, since it is inconsistent with the judgment on appeal.

In particular, we reject Berdeski's invitation to "follow the money." In explaining the multiple detailed transactions that all closed on May 3, 2017, Berdeski argues that, even though he did not *own* the Liquor License, it became available to Kanakaris as an asset of Xplorador only as a result of the significant financial contributions and concessions he made to the Ochoas, Maldonado and Ledezma, and/or Kanakaris. According to Berdeski, the $42,500 evidenced by the Note reflects consideration (i.e., repayment of what he was out of pocket) for ensuring that the Liquor License was available to Kanakaris to continue his business. To accept Berdeski's argument is to

consideration, offer and acceptance of the Note all support the trial court's legal ruling that "the mutual mistake over who owned the [Liquor L]icense" was material to the Note.[16] On our de novo review, therefore, we also conclude that the mistake was material, since *but for this mutual mistake*, Kanakaris would not have executed the Note. (See *Hannah*, *supra*, 159 Cal. at p. 147; *Reid*, *supra*, 166 Cal.App.2d at p. 483.)

Berdeski argues that, because Defendants attempted to obtain the Liquor License from *both* Berdeski ($42,500 payment evidenced by the Note) *and* from Maldonado and Ledezma ($30,000 paid for the stock and assets of Xplorador) on the same day, Defendants did not establish materiality. Berdeski contends that Defendants did not establish that, *but for the mistake* as to the ownership of the Liquor License, Kanakaris would not have agreed to pay Berdeski the $42,500 evidenced by the Note. In particular, Berdeski relies on (1) Kanakaris's uncontradicted testimony that, because he did not know whether Berdeski or Xplorador owned the Liquor License, he (Kanakaris) agreed both to purchase the Liquor License from Berdeski and to purchase the stock (and assets) of Xplorador, and (2) the following language from *Guthrie*, *supra*, 51 Cal.App.3d 879, 885 (see fn. 14, *ante*) and related argument:

> "[W]here parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that

---

credit the evidence on which Berdeski relies, which we may not do, since it conflicts or discredits the substantial evidence that supports the finding that Kanakaris gave Berdeski the Note "solely for the purchase of the [L]iquor [L]icense."

16 By applying the doctrine of mutual mistake, the trial court necessarily, albeit *implicitly*, concluded that the mistake was material. (Civ. Code, § 1577 [mistake of fact must be "material to the contract"].)

> assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain." . . . Otherwise stated, the kind of mistake which renders a contract voidable does not include mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk."

As we explain, *Guthrie* is inapplicable for purposes of determining the materiality of the parties' mutual mistake here.

In *Guthrie*, the plaintiff sellers of a newspaper sued the defendant buyer, which had resold the newspaper to a third party at a profit. (*Guthrie*, *supra*, 51 Cal.App.3d at p. 882.) The defendant buyer's sale to the third party purchaser was pursuant to an earlier judgment against the defendant in an antitrust action following the plaintiffs' sale to the defendant. (*Ibid*.) The plaintiffs sought rescission and imposition of an involuntary trust on the $4.5 million the defendant received from its sale to the third party, alleging that they (the plaintiffs) sold the newspaper to the third party as a result of a mutual mistake of law. (*Id*. at pp. 883-884.) According to the plaintiffs, they and the defendant shared "the mistaken belief that the contract [for the sale of the newspaper to the defendant] was not in violation of the federal antitrust laws when, in fact, unbeknownst to them it was." (*Id*. at p. 884.) This was despite the plaintiffs' verified allegation to the effect that, "before the parties contracted they received advice of 'competent legal counsel' that the contract was not in violation of the federal antitrust laws." (*Id*. at p. 885) The trial court sustained the defendant's demurrer without leave to amend based on the plaintiffs' failure to state a claim and entered judgment in favor of the defendant. (*Id.* at p. 883.)

On appeal, the *Guthrie* court applied the above-quoted statement on which Berdeski relies in concluding that the plaintiffs adequately pleaded a mutual mistake.

(*Guthrie, supra*, 51 Cal.App.3d. at pp. 885-886.) The appellate court explained the trial court's error:

> "It would be inappropriate, however, at the demurrer stage to determine the validity of the [defendant's] contention that the kind of mistake alleged does not render the contract voidable. It cannot be said as an abstract legal proposition that a mistaken judgment, with knowledge of the law and the facts, concerning the legal effect a court will give to a transaction cannot form the basis for rescission for mutual mistake of law." (*Ibid*.)

Very simply, the language from *Guthrie* on which Berdeski relies deals with *what must be alleged to proceed to trial* with a claim for rescission based on a mutual mistake of law.[17] *Guthrie* does not deal with *what must be shown at trial* to establish the materiality of a mutual mistake.

Since " 'cases are not authority for propositions that are not considered' " (*Kim v. Reins International California, Inc*. (2020) 9 Cal.5th 73, 85, fn. 4), the language from *Guthrie* on which Berdeski relies is not persuasive. More specifically, *Guthrie* does not deal with the issue Berdeski raises in this appeal—i.e., whether Defendants established the requisite materiality for an application of the doctrine of the mutual mistake. (Compare *Hannah*, *supra*, 159 Cal. at p. 147, and *Reid*, *supra*, 166 Cal.App.2d at p. 483, with *Guthrie*, at p. 885.) Whether the record on appeal contains substantial evidence to

---

17 *Guthrie* went on to affirm the judgment of dismissal on different grounds, ruling in relevant part that the plaintiffs' complaint was "fatally defective because it fails to set forth facts showing that plaintiffs were harmed or injured as a result of the claimed mistake." (*Guthrie*, *supra*, 51 Cal.App.3d at p. 886.) There is no issue in the present appeal as to whether Defendants (as the parties asserting the mutual mistake; in *Guthrie*, the plaintiffs asserted the mutual mistake (*id*. at p. 883)) were injured. Berdeski argues only issues related to the materiality of the mutual mistake.

support a legal conclusion that the mutual mistake was material (i.e., the issue in the present appeal) is a different consideration than whether the party seeking to avoid the contract alleged sufficient facts to establish a mutual mistake (i.e., the issue in *Guthrie*). Despite his reliance on *Guthrie*, Berdeski does not argue that the record on appeal lacks substantial evidence to support the trial court's finding of mutual mistake; and, accordingly, we express no opinion on that issue.

For the foregoing reasons, the trial court did not err by failing to address whether the mutual mistake was material, and in independently reviewing the issue, we conclude that Berdeski did not meet his burden of establishing that the mistake was not material.

C. *The Trial Court's Failure to Address Rescission is Not Error*

Berdeski argues that the trial court erred in failing to "address how to rescind the deal if the mistake was material." More specifically, he contends that a contract entered into as a result of a mutual mistake "is subject to rescission by the party harmed," citing *Guthrie*, *supra*, 51 Cal.App.4th at page 884 and Civil Code sections 1689, subdivision (b)(1), 1567, subdivision (5), 1576, 1578. There are a number of problems with Berdeski's argument.

First, to the extent Berdeski is seeking a reversal on the basis that the trial court's statement of decision did not address his objection to the proposed statement of decision for failing to include a ruling on rescission, he has waived appellate consideration of that argument. As we explained *ante*, by failing to properly request a statement of decision, all of Berdeski's objections to the adequacy of the statement of decision have been waived. (*Thompson*, *supra*, 6 Cal.App.5th at p. 983.)

Second, conclusively, rescission was not an issue at trial. Very simply, Defendants, as the parties who alleged and proved the mutual mistake, did not seek rescission. They did not mention rescission in either their affirmative defense (see fn. 12, *ante*), their trial brief, or their attorney's closing argument to the court. In our review of the record on appeal, the *first* mention of rescission is *posttrial by Berdeski* in his objections to the proposed statement of decision, after the court had issued its tentative decision.

Application of the affirmative defense of mutual mistake does not, as implied by Berdeski, require rescission of the contract at issue. As we introduced *ante*, the affirmative defense of mutual mistake is a basis for avoiding liability under a contract "through rescission, reformation, *or similar remedy*." (2 Schwing, Cal. Affirmative Def. (2d ed. 2019) § 40.1, italics added; see, e.g., *Miller v. Brode* (1921) 186 Cal. 409, 415-417 [quitclaim deed *voidable* based on mutual mistake of law as to community or separate characterization of property]; *Guthrie*, *supra*, 51 Cal.App.3d at p. 886 ["A contract is *voidable* for mistake only if . . ." (italics added)].) Here, Defendants pleaded the affirmative defense of mutual mistake, and in their trial brief the only relief they requested was a "Judgment stating the Note is unenforceable." Defendants proved their defense, and the court awarded the relief they requested. On the present record, Berdeski has no right to demand a remedy that was not at issue any time prior to or during the trial.

Finally, Berdeski's request for rescission assumes that, if awarded, the trial court would unwind *all of the transactions* that closed on May 3, 2017.[18] However, Berdeski's argument fails to recognize, as we explained *ante*, that substantial evidence supports the finding that the Note transaction was independent of the other transactions; i.e., as a single transaction entered into on May 3, 2017, Kanakaris executed the Note in exchange for Berdeski's transfer of the Liquor License to him. Thus, since Berdeski did not transfer the Liquor License to Kanakaris, rescission of the Note would not result in a transfer of the Liquor License from Kanakaris to Berdeski.[19]

D. *The Trial Court did Not Misapply Section 24076*

In its statement of decision, the court ruled that, even though Berdeski may have had an ability at one time (i.e., prior to the May 3, 2017 transactions) to sue the Ochoas for their failure to transfer the Liquor License as they agreed in their lease, "under . . . section 240[7]6, Mr. Berdeski did not have an interest in the [Liquor L]icense." Berdeski contends that, "when the implications of section 24076 are examined," the trial court misapplied section 24076. More specifically, Berdeski argues that, had the trial court

---

18 On that basis, Berdeski further argues that, since all the parties in all the May 3, 2017 transactions were not before the trial court (e.g., the Ochoas, Maldonado, and Ledezma), rescission was unavailable. As we explained in the preceding paragraph of the text, however, contrary to the premise of Berdeski's argument, application of the *affirmative defense* of mutual mistake does not require the *remedy* of rescission; and, in this case, there was no request for the remedy of rescission.

19 Rather, if the Note is rescinded (as opposed to voided or deemed unenforceable), the only consideration to be returned would be the five $588 payments that Kanakaris caused to be paid to Berdeski.

correctly applied section 24076, "the mutual mistake disappears." For a number of reasons, Berdeski cannot establish reversible error as a result of the trial court's citation to section 24076.

Initially, the premise for Berdeski's argument is that "the only possible mutual mistake the Court could have found would be weather [*sic*] Berdeski had any rights whatsoever related to the [Liquor L]icense which could be sold or released."[20] However, that is not the mutual mistake the court found. As stated throughout this opinion, the court ruled that the mutual mistake was "over *who owned the* [*Liquor L*]*icense*," not whether "Berdeski had *any rights whatsoever* related to the [Liquor L]icense *which could be sold or released*." (Italics added.) Ownership is substantively different from rights that can be sold or released. With a factually and legally incorrect premise, Berdeski's conclusion necessarily fails.

In any event, the trial court did not misapply section 24076, which provides in full:

> "No licensee shall enter into any agreement wherein he pledges the transfer of his license as security for a loan or as security for the fulfillment of any agreement. No license shall be transferred if the transfer is to satisfy a loan or to fulfill an agreement entered into more than 90 days preceding the date on which the transfer application is filed, or to gain or establish a preference to or for any creditor of the transferor, except as provided by Section 24074, or to defraud or injure any creditor of the transferor."

The purpose of this statute "is to prohibit all use of a liquor license as security" and to deem "any such use . . . unlawful." (*Holt v. Morgan* (1954) 128 Cal.App.2d 113, 116.)

---

20 Berdeski first mentions his understanding of "the only possible mutual mistake the Court could have found" on page 29 of his 30-page opening brief.

Relying on *Greve v. Leger, Limited* (1966) 64 Cal.2d 853 (*Greve*), Berdeski argues that, contrary to the court's ruling here, "Berdeski had rights arising out of the [Xplorador (Maldonado & Ledezma)] lease contract payment of the $50,000 and return of the [Liquor L]icense. He gave those up in return for the . . . [N]ote." As a record reference for this statement, Berdeski cites "Ex 36 p 2" (*sic*). However, trial exhibit No. 36 has only one page, and that one-page email does not mention the Xplorador (Maldonado & Ledezma) lease, a $50,000 payment, or a return of the Liquor License. Accordingly, we disregard Berdeski's statement concerning the rights he contended he had under the original lease with Xplorador (Maldonado & Ledezma). (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1079 [appellate court may disregard contentions unsupported by accurate citation to the record]; Cal. Rules of Court, rule 8.204(a)(1)(C).) In any event, even if the facts were as Berdeski contends, *Greve* does not help him.

In *Greve, supra*, 64 Cal.2d 853, the plaintiff sellers of premises and a liquor license attempted to enforce an option that allowed the plaintiffs to repurchase the license in the event the defendant buyer defaulted on its payment obligations. (*Id*. at p. 855.) Our Supreme Court ruled that, although section 24076 precluded the plaintiffs' cause of action for specific performance to enforce the option to repurchase the liquor license, the plaintiffs nonetheless could maintain a cause of action for money damages. (*Greve*, at p. 862.) From this authority, Berdeski contends that, following Xplorador's (Maldonado & Ledezma's) breach of the initial lease, even though section 24076 precluded a claim for specific performance directing Xplorador (Maldonado & Ledezma) to transfer the Liquor

License to Berdeski, Berdeski nonetheless maintained a claim for damages against Xplorador (Maldonado & Ledezma). Even if we assume without deciding that Berdeski's suggested application of *Greve* is accurate, the trial court's statement that Berdeski did not have an interest in the Liquor License under section 24076 is not erroneous. *Regardless whether* Berdeski maintained a right to sue Xplorador (Maldonado & Ledezma) for money damages for breach of contract, *Greve* does not support Berdeski's argument that, *under section 24076* (or otherwise), Berdeski maintained "an interest in the [Liquor L]icense." Because Berdeski's ability to sue for a breach of contract is not an interest in the Liquor License under section 24076 or *Greve*, the court did not misapply section 24076 in its ruling.

Finally, even if we assume the court did misapply section 24076 such that, as a result of Xplorador's (Maldonado & Ledezma's) breach of contract, Berdeski in fact did have "an interest in the [Liquor L]icense," such error would be harmless. That is because the court's outcome-determinative rulings would not be affected. Berdeski contends that his interest in the Liquor License was the right to sue for damages. *Regardless whether* Berdeski had an interest in the Liquor License under section 24076 and *Greve*, *supra*, 64 Cal.2d 853, however, substantial evidence still supports the finding that "the [N]ote was solely for the purchase of the [L]iquor [L]icense," and Berdeski does not challenge the finding that "the mutual mistake [was] over who owned the [Liquor L]icense." (See pt. II.B., *ante*.)

III. DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal. (Cal. Rule of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.